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9
10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13 Eduardo Tovar, on Behalf of Himself
and All Others Similarly Situated,

14 Plaintiffs,

15 v.

16 Midland Credit Management,
17 Defendant.
18

Case No. 10 CV 2600 W WMC

**REPLY IN SUPPORT OF DEFENDANT
MIDLAND CREDIT MANAGEMENT'S
MOTION TO DISMISS OR STAY ON
PRIMARY JURISDICTION GROUNDS**

Date: February 28, 2011
Time: N/A
Courtroom: 7

Judge: Hon. Thomas J. Whelan

**NO ORAL ARGUMENT PURSUANT
TO LOCAL RULE 7.1(d)(1)**

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1 I. INTRODUCTION

2 In his opposition, Plaintiff misrepresents the basis of Midland's motion to dismiss
3 or stay this case on primary jurisdiction grounds. Midland is not asking the Court to
4 dismiss or stay this case simply because the FCC is considering adopting a rule that would
5 require companies to obtain express written consent prior to placing autodialed calls to
6 consumers. Rather, the Court should abstain because in ruling on the currently pending
7 Notice of Proposed Rulemaking ("NPRM") relating to the proposed new consent rule, the
8 FCC will address issues that are critical to this case, namely whether the Telephone
9 Consumer Protection Act ("TCPA") applies to debt collection calls, and whether the
10 "predictive dialers" used by debt collectors and other non-telemarketing businesses –
11 which dial preprogrammed numbers, not random or sequentially generated numbers –
12 constitute "automatic telephone dialing systems" as defined by the TCPA.¹

13 These issues are before the FCC because they are inextricably bound up with the
14 proposed new consent rule. As explained in Midland's motion, the new consent rule, if
15 adopted, would severely curtail the ability of debt collectors and other businesses, such as
16 retailers and financial institutions, to use automatic dialing technology to contact
17 consumers. Concerned about this potential result, a wide array of interested parties,
18 including eleven members of Congress and several federal agencies, filed formal
19 comments in response to the NPRM. These comments urged the FCC to revise its
20 interpretation of "automatic telephone dialing system" so as to exclude predictive dialers
21 from the TCPA's restrictions on autodialed calls. The FCC must address these comments
22 when it acts upon the NPRM.²

23 Plaintiff does not dispute that the central issue in this case is whether the debt
24 collection calls he allegedly received from Midland violate the TCPA. Thus, to adjudicate

25 ¹ The TCPA defines "automatic telephone dialing system" as "equipment which has the
26 capacity – (A) to store or produce telephone numbers to be called, using a random or
27 sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

28 ² See, e.g., *American Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (federal
regulatory agencies are required to address "significant comments," i.e., "those which
raise relevant points and which, if adopted, would require a change in the agency's
proposed rule," in connection with their rulemaking activities).

1 Plaintiff's claims, the Court will necessarily have to decide whether Midland's system
 2 falls within the TCPA's definition of an "automatic telephone dialing system." If this
 3 case proceeds while the FCC is reconsidering its definition of "automatic telephone
 4 dialing system", there is a risk that this Court may issue rulings that are inconsistent with
 5 the FCC's ultimate decision. For example, this Court may rule that the equipment
 6 Midland uses to call delinquent debtors, such as Plaintiff, falls within the TCPA's
 7 definition of "automatic telephone dialing system" while the FCC may decide that this
 8 same type of equipment does not fall within the statute.

9 Plaintiff offers no justification for pushing forward with this case despite this risk.
 10 Plaintiff does not dispute, nor can he, that abstention on primary jurisdiction grounds is
 11 appropriate where, as here, a pending lawsuit raises issues that are currently before a
 12 federal agency in connection with a pending rulemaking proceeding. Instead, he simply
 13 argues that he did not consent to receive automated calls from Midland on his cell phone,
 14 and points out that there is already an FCC rule defining "consent" in the context of debt
 15 collection calls. But this is a non-sequitur. As exhaustively explained in Midland's
 16 motion, the FCC is considering a new consent rule, and it is because that new rule could
 17 severely impact debt collectors (and other non-telemarketing businesses) that the FCC has
 18 been asked to consider ways to exempt them from the TCPA's restrictions, for example,
 19 by revising its definition of "automatic telephone dialing system."

20 Plaintiff accuses Midland of attempting to impose a "standstill" on the court system
 21 by asking this Court to defer to the FCC's rulemaking process. But Midland is not asking
 22 that this case be put on hold indefinitely. The NPRM was issued over a year ago and the
 23 comment period closed nine months ago.³ It is highly likely that the FCC will rule on the
 24 NPRM this year. The most efficient course of action is to stay this case until the FCC
 25 provides guidance on the key issue of whether predictive dialers such as those used by
 26 Midland are "automatic telephone dialing systems" pursuant to the TCPA. This will

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 28 ³ See RJN, Ex. 1, p. 1 (NPRM adopted on January 20, 2010; Comment Date: 60 days
 after date of publication in Federal Register; Reply Date: 30 days after Comment Date).

1 prevent the risk of a court ruling that is inconsistent with the FCC's decision, and the
 2 concomitant risk of further regulatory uncertainty on this issue. Significantly, less than
 3 two months ago, the Sixth Circuit Court of Appeals invoked the primary jurisdiction
 4 doctrine and referred to the FCC a question of statutory interpretation arising under the
 5 TCPA, noting that the FCC had the authority and expertise to interpret the TCPA, and
 6 explaining that deferring to the agency would promote uniformity and regulatory
 7 certainty.⁴ This reasoning is equally applicable here. Accordingly, Midland respectfully
 8 requests that the Court dismiss or stay this case on primary jurisdiction grounds pending
 9 the FCC's final decision on the NPRM.

10 **II. THE COURT SHOULD DISMISS OR STAY THIS CASE PENDING**
 11 **THE RESOLUTION OF THE CURRENT FCC RULEMAKING**
 12 **PROCEEDING**

13 **A. Plaintiff's Complaint Raises Issues That Will Very Likely Be Addressed**
 14 **By The FCC In Connection With The Pending NPRM**

15 Nowhere in his opposition does Plaintiff dispute that resolving this case will
 16 require the Court to determine whether the TCPA applies to debt collection calls, and
 17 whether predictive dialers, such as those used by debt collectors, are "automatic telephone
 18 dialing systems" as defined in the TCPA. These very issues are currently before the FCC
 in connection with the pending NPRM.

19 As explained in Midland's brief in support of its motion, the NPRM announced the
 20 FCC's plans to, among other things, require sellers and telemarketers to obtain express
 21 written consent from consumers prior to making automated calls – even where there was
 22 an established business relationship between the caller and the consumer. Request for
 23 Judicial Notice in support of Motion to Dismiss or Stay ("RJN"), Ex. 1, p. 2. The
 24 proposed new consent rule drew an avalanche of comments from government agencies,
 25 industry associations, trade groups, private businesses, and members of Congress who
 26 explained that the proposed new rule would be untenable if applied to non-telemarketing

27 _____
 28 ⁴ *Charvat v. Echostar Satellite, LLC*, -- F.3d --, 2010 WL 5392875 (6th Cir., Dec. 30, 2010).

1 businesses, such as debt collectors (which use automatic dialing systems to ensure
 2 compliance with statutory restrictions on telephone calls to consumers). Many of these
 3 commentators urged the FCC to address this problem with the proposed rule by clarifying
 4 that the TCPA's restrictions do not apply to debt collection calls, or revising its
 5 interpretation of "automatic telephone dialing system" so as to exclude predictive dialers
 6 used by debt collectors and non-telemarketers. *See, e.g.,* RJN, Ex. 8, DEPARTMENT OF
 7 EDUCATION COMMENTS ON PROPOSED CHANGES TO FCC REGULATIONS, p.2; RJN, Ex. 9,
 8 COMMENT TO PROPOSED AMENDMENTS TO THE TELEPHONE CONSUMER PROTECTION ACT
 9 REGULATIONS, DEPARTMENT OF THE TREASURY, pp. 1-2; RJN, Ex. 10, ACA
 10 INTERNATIONAL'S COMMENT TO THE PROPOSED AMENDMENTS TO THE TCPA
 11 REGULATIONS, pp. 4-23, 60-63; RJN, Ex. 11, COMMENTS OF THE NATIONAL RETAIL
 12 FEDERATION, pp. 2-3; RJN, Ex. 12, December 3, 2010 Letter to the FCC from Rep. Jim
 13 Matheson, et. al., p. 2; RJN, Ex. 13, COMMENTS OF JP MORGAN CHASE & CO., pp. 17-20;
 14 RJN, Ex. 14, COMMENTS OF THE FINANCIAL SERVICES ROUNDTABLE, THE AMERICAN
 15 BANKERS ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION, pp. 25-28; RJN,
 16 Ex. 10, ACA COMMENTS, pp. 52-57; RJN, Ex. 11, NAT'L RETAIL FED. COMMENTS, p. 3;
 17 RJN, Ex. 15, COMMENTS OF WELLS FARGO & CO., pp. 19-21. *See also* Midland's
 18 Memorandum of Points and Authorities in support of Motion to Dismiss or Stay
 19 ("Midland Memo"), pp. 6:24-8:9.

20 The FCC will have to address these issues when it rules on the NPRM because
 21 federal agencies, such as the FCC, are required to address "significant comments," *i.e.*,
 22 "those which raise relevant points and which, if adopted, would require a change in the
 23 agency's proposed rule," in connection with their rulemaking activities. *American Mining*
 24 *Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) ("the opportunity to comment is
 25 meaningless unless the agency responds to significant points raised by the public") (citing
 26 *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)); *see also Navistar Int'l*
 27 *Transp. Corp. v. U.S. E.P.A.*, 941 F.2d 1339, 1359 (6th Cir. 1991) ("an administrative
 28 agencymust 'respond in a reasoned manner to the comments received, to explain how

1 the agency resolved any significant problems raised by the comments, and to show how
 2 that resolution led the agency to the ultimate rule.”) (internal citations omitted). Here,
 3 since so many commentators have urged the FCC to clarify the scope of the TCPA and/or
 4 the definition of “automatic telephone dialing system”, the FCC has to address these
 5 comments and thus is very likely to rule on these issues when it acts on the NRPM later
 6 this year.

7 **B. This Is The Type Of Case Which Courts Regularly Stay Or Dismiss On**
 8 **Primary Jurisdiction Grounds**

9 As explained in the instant motion – and as Plaintiff does not dispute or even
 10 address – courts regularly dismiss or stay, on primary jurisdiction grounds, cases (like this
 11 one) that involve issues that are before a federal agency in connection with a pending
 12 rulemaking proceeding. *See, e.g., Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th
 13 Cir. 2008) (affirming dismissal of class action complaint because issues raised therein
 14 were the subject of a pending FCC rulemaking proceeding); *Southwestern Bell Telephone*
 15 *L.P. v. Vartec Telecom, Inc.*, 2005 WL 2033416, *4 (E.D. Mo. 2005) (same); *Southern*
 16 *New England Telephone Co. v. Global NAPS, Inc.*, 2005 WL 2789323, *6 (D. Conn.
 17 2005) (staying claims under doctrine of primary jurisdiction where a recent FCC ruling
 18 and NPRM “demonstrate that these issues are very much in flux and currently being
 19 considered by the FCC”); *Kappelman v. Delta Airlines, Inc.*, 539 F.2d 165, 171 (D.C. Cir.
 20 1976) (doctrine of primary jurisdiction invoked where, among other things, there was an
 21 ongoing rulemaking proceeding on the general subject of the plaintiffs’ complaint).

22 “[N]o fixed formula” exists for applying the doctrine of primary jurisdiction.
 23 *Clark*, 523 F.3d at 1115. “In every case the question is whether the reasons for the
 24 existence of the doctrine are present and whether the purposes it serves will be aided by its
 25 application in the particular litigation.” *Kappelman*, 539 F.2d at 169; *see also Charvat v.*
 26 *Echostar Satellite, LLC*, --F.3d --, 2010 WL 539875 (6th Cir., Dec. 30, 2010) (collecting
 27 cases where courts have deferred to federal agencies on primary jurisdiction grounds, and
 28 noting that “[T]he outstanding feature of the doctrine is . . . its flexibility permitting . . .

1 courts to make a workable allocation of business between themselves and the agencies.”)

2 (quoting *Civil Aeronautics Bd. V. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir.

3 1950)). The purpose of the doctrine is to protect agencies possessing “quasi-legislative

4 powers” that are “actively involved in the administration of regulatory statutes.” *Clark*,

5 523 F.3d at 1115. Thus, abstention on primary jurisdiction grounds is appropriate where

6 the case involves the resolution of a “particularly complicated issue that Congress has

7 committed to a regulatory agency.” *Clark*, 523 F.3d at 1114.

8 Deference to the FCC under the doctrine of primary jurisdiction is appropriate

9 here. The issues currently before this Court and before the FCC relating to the scope of

10 the TCPA and the types of equipment that fall within the statute’s restrictions are complex

11 ones that require the technical and policymaking expertise possessed by the FCC. As the

12 Sixth Circuit found in a recent case referring a question of TCPA interpretation to the

13 FCC:

14

15 The agency has comparative expertise on the matter. The agency, no

16 surprise, is familiar with the regulations it prescribed and possesses

17 expertise over the statute it implements . . . , whether that expertise comes

18 in the form of technical experts, agency lawyers or agency staff in a

19 position to obtain input from relevant stakeholders.

20 *Charvat*, -- F.3d --, 2010 WL 5392875 at *7.

21 Here, the FCC has previously issued rulings on these complex technical issues. It

22 has expertise regarding the types of automatic dialing technology used by various

23 industries, and the record before the FCC in connection with the currently pending NPRM

24 includes evidence regarding the functionality, capability, and uses of automatic dialing

25 technology in the everyday operations of non-telemarketing businesses. *See, e.g.*, RJN

26 Ex. 16, pp. 25-31; *see also* Midland Memo at 9-10.

27 Moreover, regulatory and policymaking expertise is required to address the issues

28 raised in this case. In issuing its rules, the FCC must take into account the impact the

rules will have across a wide range of businesses and industries, and balance the

1 competing policy concerns. The FCC must also take into account overlapping regulatory
 2 schemes that place other restrictions on the activities of industries subject to the TCPA –
 3 for example, debt collectors rely on automatic dialing systems to comply with strict
 4 liability statutes like the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §
 5 1692, and similar state statutes that, among other things, govern the telephone activities of
 6 debt collectors and authorize severe penalties for misdialed numbers or incorrectly timed
 7 calls. It is precisely because these technical and policy issues have such broad
 8 implications that they should be decided by the FCC on an industry-wide basis, based on a
 9 developed administrative record, and not in a single TCPA case.

10 Further, the fact that this case presents an issue of statutory interpretation, *i.e.*,
 11 whether or not the dialing system used by Midland fits the statutory definition of
 12 “automatic telephone dialing system,” does not mean that it should not or cannot be
 13 stayed on primary jurisdiction grounds. In fact, it is not uncommon for courts to defer to
 14 administrative agencies – such as the FCC – on questions regarding the interpretation of
 15 statutes and regulations, especially where the agency has a history of ruling on the issue in
 16 question, as the FCC does here. *See, e.g., Charvat*, 2010 WL at *5-8 (invoking primary
 17 jurisdiction doctrine and referring to the FCC the issue of whether a company on whose
 18 behalf telemarketing calls were placed by a third party could be liable under the TCPA);
 19 *Michal Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993)
 20 (staying lawsuit pending FCC resolution of statutory interpretation issue, where the issue
 21 involved “the appropriate characterization of a specific and relatively new service, in a
 22 rapidly changing industry,” which had already been the subject of a number of orders and
 23 rulings by the FCC). This makes sense since “[t]he main justifications for the rule of
 24 primary jurisdiction are the expertise of the agency deferred to and the need for a uniform
 25 interpretation of a statute or regulation.” *Waudby v. Verizon Wireless Services, LLC*, 2007
 26 WL 1560295, *4 (D. N.J. 2007).

27 In sum, abstention under the primary jurisdiction doctrine is appropriate here. The
 28 “traditional factors” laid out in *Clark*, which Plaintiff does not contest, are met. *See*

1 *Clark*, 523 F.3d at 1114. This case will require the court to resolve an issue – whether
 2 predictive dialers are “automatic telephone dialing systems” under the TCPA – that has
 3 been placed by Congress in the jurisdiction of the FCC. *See* 47 U.S.C. § 151 (granting
 4 the FCC authority to “execute and enforce” the provisions of the Federal Communications
 5 Act, which includes the TCPA); 47 U.S.C. § 227 (charging the FCC with administration
 6 of the TCPA). The TCPA is a statute that subjects a company’s activities to a
 7 comprehensive regulatory authority that requires expertise or uniformity in administration.
 8 If the FCC issues a ruling on the definition of “automatic telephone dialing system,” that
 9 rule will apply to all industries where automatic dialing systems are used, and it will have
 10 been made after careful consideration of myriad technical and policy issues that the FCC
 11 is uniquely situated to address. Because a conflicting ruling by this Court would create
 12 legal uncertainty and potentially undermine the regulatory process, this is a classic case
 13 where a dismissal or stay on primary jurisdiction grounds is appropriate.

14 **III. CONCLUSION**

15 For the foregoing reasons, Midland respectfully requests that the Court grant
 16 Midland’s motion and dismiss or stay this case pending the FCC’s ongoing rulemaking
 17 proceeding.
 18

19 Dated: February 18, 2011

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